

## **MASSACHUSETTS RULES OF CIVIL PROCEDURE**

### **RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY**

#### **Reporter's Notes--2017**

The 2017 amendment to Rule 26(b)(5)(A) changed the procedure involving assertions of a claim of privilege or protection of trial preparation materials in connection with discovery requests. It deleted the language that a privilege log must contain specified information--author, recipient, date and type of document, etc.--where a party responding to discovery claimed privilege or protection from discovery.

In 2008, an amendment to Rule 26(b)(5) added the requirement of a privilege log to the Massachusetts discovery rules. The procedure adopted required a designation of each item withheld, document-by-document. Where information was withheld from discovery on the basis that it was privileged or otherwise subject to protection, the withholding party was required to produce a privilege log, unless the parties agreed otherwise in writing. The privilege log was required to list the author and sender (if different) of the document, the recipient, the date and type of document, and the subject matter of the withheld information. In many instances, the requirement of a privilege log listing each document with the required information has proven to be burdensome and in some instances, impractical, given the large number of matters that may exist in an electronic format. This may be especially true where discovery seeks production of electronic mail, text messages, or other forms of electronic communication. Hence, a decision was made to revisit the process.

The 2017 amendment to Rule 26(b)(5)(A) eliminated the requirement of producing a document-by-document log in the first instance containing the specified information. In its place, it adopted an approach used under the Federal Rules of Civil Procedure since 1993. It requires a party seeking to claim privilege or protection to “expressly make the claim” and to “describe the nature of the documents, communications, or tangible things not produced or disclosed...in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.”

To comply with the revised rule, a party may respond with a privilege log or index in any appropriate way that allows other parties to evaluate the claim. The 1993 Notes of the Advisory Committee on the Federal Rules of Civil Procedure regarding Rule 26(b)(5)(A) of the Federal Rules state:

The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.

By virtue of the 2017 change in the Massachusetts rule, there is no longer a requirement that each item withheld be listed together with the name of the sender, etc. For example, a categorical privilege log may be appropriate where a request for documents encompasses a large number of communications between a lawyer and a client such that a document-by-document listing would be unduly burdensome. See *Games2U, Inc. v. Game Trucking Licensing, LLC*, 2013 WL 4046655 (U.S.D.C. D. Ariz. 2013); *Companion Property and Casualty Ins. Co. v. U.S. Bank National Assoc.*, 2016 WL 6539344 (U.S.D.C. D. S.C. 2016). If the requesting party is of the view that such a categorical response is not adequate to allow it to make an intelligent decision as to whether all such documents are privileged, the party may seek appropriate relief in court. See *Automobile Club of New York, Inc. v. Port Authority of New York and New Jersey*, 297 F.R.D. 55 (U.S.D.C. S.D. N.Y. 2013) (motion for an order requiring defendant to amend the privilege log; court ordered categorical privilege log to be supplemented).

The rule as amended is not intended to prohibit a document-by-document privilege log containing detailed information if a party chooses to respond with one.

The final paragraph of Rule 26(b)(5)(A) provides that upon motion, a court may order the withholding party to provide additional information to enable the requesting party to assess a claim of privilege. This sentence is intended to address the point made in the 1993 notes of the Advisory Committee on the Federal Rules of Civil Procedure that when withholding information, a “party must also provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection.”